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Toby G. Kleinman & Philip Kaplan

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COMMENTARY

## Relaxation of rules for science detrimental to children

Toby G. Kleinman<sup>a</sup> and Philip Kaplan<sup>b</sup>

<sup>a</sup>Adler & Kleinman, Highland Park, New Jersey, USA; <sup>b</sup>Independent Practice, Columbus, Georgia, USA

### ABSTRACT

This article examines the impact of the current role of evaluators in divorce and child custody cases where there are allegations of domestic violence and/or child abuse and what the courts permit as testimony by experts. The authors explore the courts' permissive rules in family courts, and the influence evaluators have on the resulting decisions in those court cases as well as how personal beliefs, knowledge, experiences, and biases of the evaluators can affect evaluators' recommendations to family court judges. The rules which permit less use of traditional normative tools, such as tests and assessments, in the specialized environment of a divorce proceeding or allegations of abuse are examined by the authors. This exploration takes place in the context of the scientific and professional associations that govern the psychology community. Finally, the article examines how a child's report of abuse can negatively impact the court when in the hands of an evaluator who lacks sufficient training in domestic violence and child abuse and/or lacks the tools necessary to properly assess the issues before the court.

### KEYWORDS

Child abuse; child custody; domestic violence; experts

Family courts have the power to keep parents who harm their own children from parenting those same children. In families in which child abuse or domestic violence occurs, divorce and disputes over custody can follow. The U.S. Department of Health and Human Services reports a high range of the co-occurrence of domestic violence and child abuse. The family court judge is supposed to weigh in favor of child protection, even over the rights of the parents when managing disputes in families, where violence and abuse is occurring or at risk of occurring to a child. A judge is required to act as *parens patriae*, essentially making decisions as the child's super parent. Judges, either on their own initiative or at the behest of the litigants, may order that the family be subjected to a custody evaluation by an expert who is presumed to have the knowledge, training, and experience to offer expert opinion regarding parenting, custody, and visitation. At the outset of cases in which abuse and/or domestic violence is raised, the judge often is required to make rulings regarding contact between the children and the parties based on limited information while the case progresses.

Generally, when expert opinions are presented to a court, the rules of court require that expert testimony be reliable and scientifically based. How the court should determine what is acceptable expert opinion is outlined in standards that have developed from the rulings in *Frye v. United States*, 293 F. 1013 (D.C. Cir 1923) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The *Frye* and *Daubert* derived standards are, however, are all too frequently not applied in family court proceedings with the same rigor as in criminal and other civil court proceedings as some courts are allowed to be flexible with the rules. Particularly at the early stages of a case's process through the system, when the judge has to determine contact and visitation, this can become problematic. Many family courts permit a relaxation of rules, theoretically to provide the judge with as much information as possible to make an early determination in the best interest of children. This relaxation of the rules allows and may actually invite actions by the court based on un-cross-examined expert reports and other opinions offered by friends, family, and professionals that would not be entertained in any other civil or criminal court proceeding absent adhering to evidentiary rules that require testimony and cross examination and that may actually lead to harming children. Lawyers would object to their inclusion in the record in any other court as they lack sufficient basis and often present hearsay. The relaxation of the rules permitting opinions the judge will hear absent cross examination, especially on interim decisions, which may become lasting decisions encourages unscientifically based opinions, essentially speculation by experts rather than the presentation of opinions based on science and accepted practice. (See, for example, New Jersey Courts Rule 1:1-2.)

There is a schism. The relaxation of the rules is intended to provide as much information as possible to the judge so that he can appropriately weigh all available information and opinions and arrive at a decision providing the best solution for the child(ren) in question. It is intended to allow the court to gather information at the initial stages of the dispute. But while permitting this relaxation of the rules of evidence may seem inclusive, doing so provides the opportunity for unscientific information and opinion about child abuse and domestic violence to be considered, contributing to decisions that can ultimately put children and victims of domestic violence in harm's way, rather than protecting them. This is especially true where there is no ability to cross examine before orders are entered and/or where the court is familiar with a particular expert and trusts him even absent his having particularized training in domestic violence and child abuse. Domestic violence and child abuse knowledge may be counter-intuitive to the untrained judge so wrong decisions are easily made which actually put children in harm's way. Research deals with aggregate numbers of cases. Judges deal with individual cases. Each case has its own

unique facts. When expert opinions are required to be predicated on science and research literature, even where conflicting opinions may exist, the court has a scientific basis to determine the validity of the science being offered and whether or not it is relevant to the specific case. If science and research are permitted to be ignored, judges can easily rely upon unqualified experts to educate them. Lawyers are not required to promote science or have unscientific testimony precluded. They may engage experts who are able to articulate opinions that suit their cases regardless of the underlying non-scientific basis of the opinion. Erroneous conclusions may then be offered and accepted as fact by unknowing courts and mistakes most certainly are then made.

### **Expert opinions and beliefs**

Domestic violence and child abuse are behaviors that usually occur in private. The conclusion that violence or abuse has occurred, absent an admission, often requires experts to provide opinions regarding the individuals involved. Whether abuse or domestic violence has occurred is a finding of fact to be made by the court. Absent expert opinions from properly qualified and trained experts about the individuals involved, arguments based upon unqualified experts can easily become disputes that are based upon non-science and cast in the light of a dissolving marriage. Expert opinions must be filtered through available data from the case and the science of abuse and domestic violence. The dangers to a child of formulating expert opinion without using known science can be devastating to the child and, indeed, has resulted in the harm of too many children.

If the expert involved in a family court dispute that includes child abuse and domestic violence allegations is properly trained and assesses the allegation to be likely, the resulting opinions and recommendations that follow would likely be different than if they were thought to be unfounded. The importance of the custody evaluator's beliefs and bias with regard to domestic violence and related cases was illustrated in the work of Saunders, Faller and Tolman (2011) (hereinafter referred to as Saunders et al). The scope of the Saunders et al. inquiry was broad, and included judges, private attorneys, legal aid attorneys, domestic violence workers, and over 450 custody evaluators working in county court and private settings. Saunders et al.'s findings make clear the critical necessity for the use of science in these cases and make it even clearer that even with skilled and experienced professionals, personal beliefs and experiences affect their opinions and can override the outcome that opinions based on knowledge of the literature would suggest.

The findings of Saunders et al. (2011) indicated that custody evaluators have a greater propensity to regard women's allegations of domestic violence with more skepticism than domestic violence workers and legal aid attorneys. Furthermore, in the Saunders study, the custody evaluators were found to

only support the allegation of domestic violence in approximately 50% of the cases they handled contrary to the literature's findings of approximately 75% (for example, see Jaffe & Austin, 1995, and Johnston, Lee, Olesen, & Walters, 2005). Saunders also reported that custody evaluators estimated that 25% to 33% of child abuse allegations were false in contrast to the literature that reports very low incidence of intentional fabrications of abuse allegations (e.g., Trocmé & Bala, 2005).

What is most remarkable is the degree to which custody evaluators reported making recommendations about custody and visitation that discounted the psychological consequences to children who had been abused and/or exposed to domestic violence. The impact the children are likely to experience when put in the control of the abusing parent was also not evident in many of the not properly trained evaluators' recommendations. Stunningly, when asked about recommendations they would make in a situation where one parent was clearly the perpetrator of domestic violence, in almost 25% of the cases they report they would recommend unsupervised visitation and 40% of the evaluators said that they would recommend joint legal custody and physical custody to the victim at least "half the time" to "always." This contradicts the known fact that children suffer when another parent is abused (e.g., Child Welfare Information Gateway, 2015). The impact of a court imposing an unsupervised contact of days, weeks, months, or years on a child to be with an abusive parent poses long term negative consequences for that child's mental health and development. In a study by Silberg, Dallam, and Samson (2013), of 27 cases in which children were initially placed in the custody of an abusive parent it took, on average 3.2 years for the court to reverse the ruling and place the children with the protective parent. The Silberg study, which has limitations related to its sampling issues, does, however, shed light on the consequences of a family court judge placing children with abusive parents. Children who are abused or exposed to abuse and then placed in the hands of the abusers are less likely to be able to access treatment to address the consequences of the abuse and are less likely to complete adolescence without developing negative coping skills that undermine their mental and physical health. The Adverse Childhood Experiences Studies (Felitti et al., 1998) and UNICEF's Report on the Impact of Domestic Violence (2006), outline the deleterious effects on children's problems with anxiety in those situations and their problems with the acquisition of appropriate self-regulation skills and their derailment from a healthy trajectory of development.

Additionally, having the contact imposed by the judicial system would likely introduce a kind of institutional betrayal as initially outlined by Freyd, (1991). Having a court impose a decision that denies the actual experiences of the child presents at least two options to the child who has been exposed or directly experienced abuse, to either accommodate and disconfirm their own experiences or find alternative ways to manage the disconfirmation of their

actual experiences. These choices can result in a child denying their own reality and expressing their distress through other means and/or losing trust in the social and judicial system that contributed to their victimization.

In a time where the research in the consequences of the use of corporal punishment (CP), which is legal in many states and may not be seen as severe as abuse or domestic violence, has been demonstrated to have a strong association with the development of serious problems in children), placing a child in an abuse situation would likely have even greater negative impact on their development than CP would. In reviewing the literature Straus and Douglas (2008) observed:

Without exception, these 20 studies revealed that CP was associated with an increased probability of mental health problems. Thirteen studies investigated delinquent behavior. It is widely believed that CP “teaches the child a lesson” and therefore reduces delinquency. Instead, in 12 of the 13 studies CP was found to be associated with a higher probability of delinquent and anti-social behavior. The same near unanimity (4 out of 5) was found for studies of the relation between experiencing CP as a child and later adult criminal behavior. (p. 19)

The findings of Saunders et al. (2011), indicated a propensity to view protective actions of the parents as not valid, and thereby those evaluators tended to view efforts to protect the children as engaging in alienating the children from the other parent. The evaluators in the Saunders et al. study tended to favor the perpetrator of abuse in custody and visitation arrangements based on flawed beliefs which are not supported by literature, that domestic violence survivors work to alienate children from the perpetrating parent, that allegations of domestic violence are likely false, that victims of domestic violence hurt children by resisting co-parenting, that domestic violence is not connected to parenting, and that coercive-controlling violence was not a relevant factor to explore during the evaluation. Beliefs related to the gender of the untrained evaluator indicated male evaluators were more likely to regard domestic violence allegations as false and that domestic violence was not relevant to a custody decision while female evaluators were more likely to believe perpetrators of domestic violence alienate their children from their mothers.

The evaluators' core beliefs, and beliefs about custody, as well as experience together with current knowledge regarding domestic violence were found to play an important role in opinions and recommendations. Current knowledge of evaluators about post-separation violence, the consequences of children witnessing domestic violence, and other factors regarding domestic violence, correlated highly with making recommendations to award custody to mothers and provide protection for children.

Court based evaluators are likely to have more experience with these cases than private evaluators and were less likely to believe that allegations of domestic violence were false. It is possible that the kinds of cases handled by court

based versus private evaluators differ and might contribute to this finding, and further research into this area would be beneficial.

While false allegations of domestic violence can be made, one's biases and limited education in the area contributes to dismissing domestic violence allegations without proper consideration. Evaluators who affirmed beliefs that indicated women have achieved equality with men, that the world is a just place, and that social hierarchies were good were more likely to view allegations of domestic violence as false and bias judgments in favor of alleged perpetrators of domestic violence.

### **Ethical practice standards and guidelines**

The accrued knowledge from decades of research on child maltreatment, child abuse, domestic violence, effects of divorce, and general practice have contributed to the scientific community's development of the practice guidelines to ensure the best possible results in family court investigations. The guidelines promulgated by the American Professional Society on the Abuse of Children (APSAC), The American Academy of Child and Adolescent Psychiatry (AACAP) as articulated by Kraus and Thomas (2011), and the American Psychological Association (APA) are examples of such guidelines that are relevant to the scientific basis upon which expert opinions should be based. There is coherence throughout these guidelines that stipulate that experts have the requisite training, experience, and current knowledge of relevant research to ensure best practices. Indeed in New Jersey, complaints were filed against a psychologist in a case that involved child sexual abuse and the psychologist voluntarily gave up her license in the face of the evidence that her practice was not guided by the requisite training, experience, and specific knowledge [see *In the Matter of the Suspension or Revocation of the License of Susan Arbiter Psy.D. License No. 00164500* (June 6, 2006)].

These criteria are specifically evident in Principle 3 of the AACAP Practice Parameter for Child and Adolescent Forensic Evaluations, in The Role of the Evaluator Section of their Practice Parameters for Child Custody Evaluation, Standard III of the APSAC Code of Ethics, Section VII of APSAC Practice Guidelines of Psychosocial Evaluation of Suspected Psychological Maltreatment in Children and Adolescents, General Guideline II, number 4 of APA's Guidelines for Child Custody Evaluations in Family Law Proceedings (CCEFLP), and General Guideline II, number 5 of the APA's Guidelines for Evaluations in Child Protection Matters (GECPM).

The APA Practice Guidelines for CCEFLP specifically assert in General Guideline 4, that "general competence in performing psychological assessments of children, adults, and families is necessary but insufficient" and "an evolving and up-to-date understanding of the child and family development, child and family psychopathology, the impact of relationship dissolution on

children, and the specialized child-custody literature is critical to sustaining competent practice in this area” (p. 864).

Given the understandings gleaned from Saunders et al. (2011), experience and belief about domestic violence affects the opinions of evaluators. The standards should and do require that evaluators be properly trained, educated, and experienced in the specific areas of domestic violence and child abuse in which their opinions are offered. Child Custody Evaluations in Family Law Proceedings (CCEFLP), guideline number 11 acknowledges that the child custody context is one that may affect the perceptions and behavior of those being examined that are severe enough to alter responses to psychological tests and interviews, producing essentially unreliable data and decreased validity that can contribute to erroneous conclusions and misleading recommendations. Similarly, Standard 2.04 of the Ethical Principles of Psychologists and Code of Conduct (EPPCC) asserts “Psychologists’ work is based upon established scientific and professional knowledge of the discipline” and in Standard 2.01: “Psychologists provide services ... in areas only within the boundaries of their competence.” Standard 9.02 advises psychologists to administer assessment procedures, information and data collection “in light of the research on or evidence of the usefulness and proper application of the techniques ... use instruments whose validity and reliability have been established for use with the members of the population ...” One might assume that this would be sufficient to ensure that custody evaluators gather relevant data, administer appropriate measures, and interpret all information from within the context of the examination. Despite these imperatives, this is not always the case.

It is unscientific and wrong to use a measure as though it was normed for a specific population and purpose when it was not. Moreover, it is an error to interpret the results of that measure out of the context in which the responses were collected. Child Custody Evaluations in Family Law Proceedings (CCEFLP) asserts in Guideline 3 that “Comparatively little weight is afforded to evaluations that offer a general personality assessment without attempting to place the results in the appropriate context.” The Ethical Principles of Psychologists and Code of Conduct (EPPCC) Standard 9.06 states:

When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists’ judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations.

It would seem that experts who are properly trained and present information tempered within the limitations of the context should be comfortable with defending their opinions and the limits of their confidence in them and family courts should demand nothing less. That is the essence of a scientific

approach that properly meets evidentiary standards that can and should be accepted by courts.

The normative samples that contributed to the development of the most commonly used psychological tests and personality inventories are not thought to be representative of those involved with a heated custody dispute. The overriding emotionality of such conflict is likely to skew the results. Zervopoulos (2008), among others, outlined the problems of the misuse and limitations of tests that are frequently used in custody evaluations. Furthermore, even the use of well-established psychological measures is of limited value because of their often limited relevance to the questions before the court (Emery, Otto, & O'Donohue, 2005). It should be without argument that the results of the various tests and personality inventories need to be interpreted within the context in which they were administered and not interpreted as though they are as reliable a measure as when used in the clinical situations for which they were developed.

### **Vulnerability of children**

Family courts are affected by what is commonly accepted in society. There is an inherent disbelief in society as to children's reliability as reporters. It seems to be assumed that children overstate things that happen to them. This social belief contradicts vast amount of research which says that children do not generally lie about abuse and, if anything they tend to underreport (e.g., Sjöberg & Lindblad, 2002). Child Custody Evaluations in Family Law Proceedings (CCEFLP), Guideline 1 directs that the purpose of the evaluation is to assist in determining the best interests of the child, while Guideline 2 stresses that "The child's welfare is paramount." Additionally, Guideline 5 directs the psychologist to strive to function as an impartial evaluator. An evaluation should address the children in these situations and adequately explain the low frequency of children's exaggerating regarding abuse and reports of child maltreatment in general.

The report by the U.S. Department of Health and Human Services (2012) pertaining to the false and substantiated rates of child maltreatment by the 10 States tracking false reports indicated that only 1.07% of reports of child maltreatment were deemed false. While this finding relates to the general population and is not specific to children in custody disputes, it certainly encourages caution about ignoring children's disclosures of abuse. There is therefore no basis for evaluators to disregard the disclosure of children and protective adults regarding abuse and maltreatment, because the base rates are so low for false reporting in general and there is a lack of specific data that would suggest that children in custody disputes are more likely to report falsely.

While judges and others might automatically suspect the veracity of children who report abuse and maltreatment, especially when the named

perpetrator is a parent, it follows that when a newly separated parent reports a child's disclosure of abuse and maltreatment, the focus of a family court investigation would gravitate to an inquisition of the reporting parent's motives, reactions, and feelings rather than a child-focused protective response. This is in itself unscientific as it is not based on any data other than the denial and accusations of the alleged perpetrator.

### **Family versus criminal court treatment**

When the issue of abuse and maltreatment goes to family court, the reports of abuse can be minimized by the context of the conflict of the divorce action. All too often, abuse and maltreatment take a back seat to the attack on the person who brought it to a court's attention. If a child was the victim of an assault by an unrelated adult, the investigation of the crime would be much different in a criminal court process than when a child is a reported victim of abuse in a family court setting. Additionally, the criminal court process would rely on the expert testimony that could contribute to guilt or innocence and that expert opinion would be held to a critical review of the underlying science. In family court, speculations and beliefs about the motivations of protective parents are not held to the same critical eye.

When such a matter is first reported to a family court, we are in a circumstance where the reporter, most often a mother, cannot only be disbelieved by a court, but she can become the focus of the investigation. The parent who reports abuse their child disclosed would likely anticipate that the child will be believed and protected. Instead, the parent finds themselves in the center of attack. Rather than granting the child protection, the court does not accept the parent's report of the child's words. Sometimes a forensic evaluator is assigned to evaluate all of the parties in the divorce action, rather than appoint a specially trained evaluator to assess only in regard to the issue of abuse. Child Custody Evaluations in Family Law Proceedings (CCEFLP), Guideline 8 indicates that psychologists strive to establish the scope of the evaluation in a timely manner and consistent with the nature of the referral question. The Ethical Principles of Psychologists and Code of Conduct (EPPCC) Standards 2.01 and 9.02 direct that a psychologist not accept referral questions that are inappropriate. It is the expert conducting the evaluation who should advise the court as to the proper focus of the evaluation and not accept an imposed role that will be unhelpful to the child(ren) and in violation of CCEFLP Guideline 2 directing that the child's welfare is paramount.

### **Consequences of the family court's process**

Family violence is a crime, and the family court's process, although not directed at convicting criminals, still has to manage the issues when there is

reason to believe that a crime may have occurred. Criminal prosecutions are easily tainted by a family court depending upon how they are handled early in the allegation phase of litigation. Problems with prosecution of an abuser could be compromised if at the outset, the judge permits continued contact between the named perpetrator and victim, either through continued shared custody or visitation. If the child is, in fact, the victim of abuse, the continuing contact might result in threats, bribes, confusion in the child's mind regarding the lack of protection once the abuse had been disclosed, and recantations, that would muddy the waters of any prosecutorial effort. Any demand from the perpetrating parent to be included in the evaluation of abuse could be viewed as similar to that of perpetrator of violent crime to participate in the interviews of the victim. The APSAC Guidelines regarding the Forensic Interviewing in Cases of Suspected Child Abuse (FICSCA) indicates in Section I, "The purpose of a forensic interview in a suspected abuse case is to elicit as much reliable information as possible from the child to help determine whether abuse happened." There is no requirement in the APSAC Guidelines that the parents be included in the evaluation or interviews. While it may be helpful to interview the alleged perpetrator of abuse, involving them in the process prematurely may provide the alleged abuser or other interested family member the opportunity to exert influence. Specifically, in Section III regarding Interview Context, number 3: "Parental notification may be inadvisable when parents or other family members are suspects, and/or when notification may result in attempts to influence the child's report, prevent the interview, or cause destruction of evidence." It is at this stage that a court should carefully protect the interests of a potential future prosecution.

When a custody evaluation is performed, rather than an abuse-specific evaluation, the focus is on the parents rather than on the allegations made by the child. In one typical scenario, the father denies abusing the child and accuses the mother of being overly angry at him; he alleges that the mother created a "story," coached the child, and that she is seeking to interfere with his relationship with the child. Problems can result if the court orders the mother not to discuss the child's allegations with the child. The child, who trusted the mother enough to disclose, has the trusted parent essentially removed as a confidante who can provide support and validation of their genuine experience, which in itself, is confusing and likely harmful to the child. Such a shift in position can contribute to the child's seeking to revise their responses in order to secure the previous position in their relationship with the protective parent and thus muddying the data that subsequent interviews may generate.

In the aforementioned scenario in which the child's disclosures are not accepted at face value, the father likely continues seeing the child. In that circumstance, there is a negative message to the reporter and to the child. The mother who reported the disclosures of abuse feels unsupported, whereas

the father, the named abuser, can feel believed and empowered. The child, who loves the father despite the abuse, may feel safer if a supervisor is present and not disclose again. In this scenario, it is even more imperative that an expert understand the scientific findings pertaining to disclosure and behavior of an abused child. An abused child may have been threatened. An abused child may fear a parent going to jail and feel responsible. Knowledge of the research in this area is critical to arrive at valid opinions.

Another possible outcome of the family court's intervention in which the reported abuse is either disbelieved, minimized, or even accepted as fact, involves a named perpetrator being admonished by the court not to abuse again and nothing is done to intervene with regular visitation. When the conflict between the parent's rights versus the child's rights for protection are resolved in favor of the named perpetrating parent, the child is essentially being told, through actions of the court, that their report is invalid or unimportant. The physical or sexual abuse of a child by a parent in the middle of divorce may be the only crime where we ask a potential criminal if he committed the crime and rely upon his denial. It may also be the only crime other than rape where we assume the victim is lying. Indeed, an abusive parent actually lives in a circumstance where his behavior can be repeated at will much like a career criminal who continues to "get away" with it. Would a court consider telling a career criminal to "knock it off" while an allegation is pending? But in child abuse cases, as in domestic violence between spouses, courts tell abusers to stop abusing and actually rely upon the court's admonition not to abuse as if they really have that power. Indeed, if anyone really believed a child was being violated, the perpetrator would not be allowed access to the child. The assumption, therefore, appears to be that the perpetrator is being truthful. The child's words are not at the forefront, get lost, and are reported as if they were the protective parent's. The perpetrator deflects and says things like, "I would never abuse" or "I would never do such a thing and the reporting parent has always had a problem with sex" (as if child rape and molestation is the equivalent of adult sex); or "I don't understand why the child (or reporting parent) would say such a thing." It is likely helpful to consider how criminal court judges and juries would regard the denials of adults charged with the abuse of someone else's child as a contrast.

Anecdotal experience suggests that when the named perpetrator's words are examined carefully, the offending parent makes him or herself out to be a victim of the protecting parent's attacks as if they had a spurious motive. Even the evaluation of the child risks becoming focused on undoing the disclosures of the child, rather than learning about the abuse itself, the evaluator becomes preoccupied with trying to figure out why else they might be accusing a parent of abuse. As evidenced by the findings of Saunders et al. (2011), the beliefs of evaluators are best managed by requiring experts to have

science-specific knowledge as they would if this case was being criminally prosecuted.

It is bad enough that children are the only class of citizens who can be physically assaulted with impunity, i.e., corporal punishment, but in cases where they are the victims of maltreatment in the context of a divorce dispute, children too often are disbelieved even when it is they who are first-hand reporters of things that have happened to them. Such children are not always seen as victims; instead, their words are parsed. Clearly, the rights accorded the child for protection from further assault is greater if a non-parent is accused of harming a child than if their own parent was named as the perpetrator, although it can be argued given the previously cited Adverse Childhood Experience study the violation of a child by a parent is far more damaging to the child than if by a stranger (Felitti et al., 1998).

The court should require an expert with specialized knowledge and training be the one interviewing children suspected of abuse. An expert can explain the scientific basis for why the child has reported in the way they did—how the experience of abuse appeared through the eyes of the child. Without that perspective, court becomes the “he said-she said” dispute, while the child’s words are ignored. Thus, the results of a poorly constructed and focused evaluation in family court may make it virtually inevitable that there will not be a criminal prosecution even if abuse is found.

### **Persistence of non-science in family court**

Why does this happen? In other areas of law, court rules require science in court. Why in the area of family law is it permissible to ignore science and the standards of practice? Ignorant lawyers, an unbalanced system of finances between parents, and the protective parent being essentially charged as if they were the “state”—the prosecution—to prove the case without the resources or knowledge of how to do so are likely contributors to this circumstance. Further contributing factors are untrained judges and having dockets too large to give proper time to each case. The appeal of unscientifically based constructions is that they can provide a ready and efficient explanation of the surface pattern in front of the court and provide clear interventions. We must demand actual science in family court.

The foremost example of non-science is found in the ongoing emotionally laden but non-scientific controversy regarding Parental Alienation Syndrome/Parental Alienation (PAS/PA) type explanations for children rejecting a parent whom they assert is a source of danger. For a recent review of the limitations and lack of scientific foundation of PAS/PA formulations, the reader is referred to Meier (2013). That PAS/PA is being entertained as a basis for expert opinions in family courts is illustrative of the limited standard to which science is held. Despite the caution found in “A Judicial Guide to Child Safety

in Child Custody Cases” issued by the National Council of Juvenile and Family Court Judges (2009), that “Under relevant evidentiary standards, the court should not accept testimony regarding parental alienation syndrome or ‘PAS.’” These constructions are frequently entertained by courts in efforts made by named perpetrators to minimize and deny allegations of child abuse. Although it is true that parents and children can become alienated from one another for many reasons, there is scant peer reviewed research that would suggest that children disclose abuse in accordance with the PAS/PA construction. Further, an evaluator who did not come into the scenario with the presumptions that PAS/PA brings with it, would likely be able to identify the unique elements of the relationships in a family in which a child refuses contact with a parent and be able to report to the Court their explanation for the alienation. The problem with PAS/SA is its use in defending against allegations of abuse. It should not be permitted, as it is unscientific.

It is the illusion of science that promotes the false paradigm and sustains it despite the limitations of the evidence. It is also the efficiency of the solutions these constructions offer that make it even more appealing. A parent accused of domestic violence and/or child abuse asserting their love and desire for their children as well as asserting their rights to parent while explaining their rejection of them as a consequence of the other parent poisoning their children’s minds against them in order to get even with them is ludicrous if one accepts the children’s disclosures of child abuse or domestic violence as genuine. The idea that children can be coached to effectively present as victims of abuse by describing their experience in age appropriate terms and appropriate affect along with manifesting symptoms of the consequence of the abuse needs to be contrasted with parents’ usual effectiveness in coaching when it comes to getting children to brush their teeth, do their homework, or pick up their toys. When the assertion of PAS/PA is supported by someone the court views as an expert, suddenly it takes on credence, despite the lack of science behind it. Without the expert suggesting that the mother’s presentation in court is the result of the desperation that victims of domestic violence can feel when confronting their perpetrator, all the judge is left with is “he’s got a point.” The face validity of the situation can be so compelling that the judge sees no choice but to agree with the named perpetrator, punish the protecting parent, and deprive the children of protection. The illusion presented in court can be very compelling, but it is as much an illusion as the one Copernicus faced when he suggested that the earth revolved around the sun rather than the other way around; the scientific fact, was rejected by the scientific community because they could not get over the illusion of stepping outside and “seeing” the sun move across the sky.

That science gets it wrong at times is not new and as it progresses, it self-corrects by collecting more and more data and refining its models, theories, and hypotheses. The best current knowledge is essential to forming

expert opinions with validity. Prior to PAS/PA, there have been missteps and misconstructions, albeit less malignantly designed, that imposed erroneous conclusions based on the compelling appearance of surface behavior and resulted in misguided and harmful intervention strategies. The early literature on autism into the 1970s carried this kind of error (e.g., Bettelheim, 1972). They initially attributed the development of what is now referred to as autistic spectrum disorder to the “refrigerator mother” so called because she seemed to be cold and unaffectionate to her autistic child. As we progressed the understanding of autism as more neurological in its basis, we understood that the “refrigerator mother” was just a caring mother who learned to limit her contact with her autistic child so the child could handle the interaction. What it looked like was not what it was.

### **Ethical and practical guidelines revisited**

In the area of custody disputes that involve child abuse and domestic violence, we need to progress based on the available science. The scientific literature has demonstrated that a child of 5, 6, 7, or 8 reporting abuse does not have a hidden agenda, and uses age-appropriate language to describe whatever he or she does, feels and experiences and expresses it with developmentally appropriate affect that is congruent with the contents being disclosed. In the vernacular, children “tell it like it is.” We know perpetrators do not readily admit crimes against children. We know perpetrators of child maltreatment and sexual abuse often have multiple victims and they should never be alone with children (e.g., Shusterman, Yuan, & Fluke, 2005). The Association for the Treatment of Sexual Abusers (2001) Professional Code of Ethics Section 9a, regarding confidentiality requires the therapist to advise abusers they are treating that mandatory reporting laws would be an exception to confidentiality of treatment due to the understanding of the propensity to reoffend. We know it is the perpetrator of abuse of a child who threatens to harm the child or someone he loves and may mock the child, saying s/he won’t be believed. We know children are confused by their abuse by a parent. Paine and Hansen (2002) present a coherent review of the strategies employed to influence a child to be complicit and secret about their experiences of abuse. When a child makes a disclosure of abuse, the disclosure is made more likely with reticence and minimization, and having to overcome the strategies that have been utilized to silence them. The reticence to report and the known rates of recantation, even in the cases of substantiated abuse, further contributes, however, to the appeal of the non-scientific explanations that minimize or dismiss the child’s disclosure as genuine.

Experts in family courts offering opinions should be held to the same standards to which experts in other courts are. Particularly guidelines related to having specific and current competencies in the area of child custody, child abuse, domestic violence, and related areas that pertain to family process,

divorce, and child development should be the rule. Unfortunately, the family court process often makes demands for poorly considered opinions or even carefully considered opinions on limited data sets. The current literature should inform you of the process and content of your assessments, data collection, and theoretical constructions. Opinions and recommendations should be qualified given the limitations of knowledge. Beliefs and personal values and biases need to be understood and neutralized in order to arrive at scientifically based opinions and recommendations that will result in the protection and support of children.

Enlightened self-interest of anyone accepting or assuming a role as an expert would dictate careful compliance with standards of practice, codes of ethics, laws, and informed moral judgments. Court orders do not protect professionals from ethical issues should they violate their standards of practice or professional codes of ethics. It is ethical practice to inform the court of orders that include poorly construed questions, unethical relationships, and improper evaluations, interventions, or procedures. Ethical practice is not just a good idea. It provides everyone protection and supports the integrity of the process. Variance from it can result in negative outcomes for the child(ren), licensure complaints, malpractice litigation, and loss of prestige and income for the expert.

Ultimately, the family court, by holding experts to the same scientific standards as the rules of court calls for, will improve the quality of the outcome of its cases. It will also overcome any reliance on quick decisions when it comes to child safety.

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